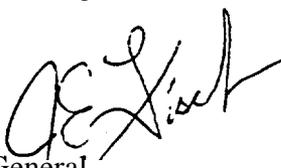




MAY 22 1996

**MEMORANDUM FOR:** TIMOTHY M. BARNICLE  
Assistant Secretary for  
Employment and Training

**FROM:** JOSEPH E. FISCH   
Assistant Inspector General  
for Audit

**SUBJECT:** OIG's Audit of ETA's Foreign Labor Programs  
Final Report No. 06-96-002-03-321

Attached is the Office of Inspector General's final audit report on ETA's foreign labor Permanent Labor Certification (PLC) and Labor Condition Application (LCA) programs.

The audit results demonstrate legislative and regulatory changes are needed if the programs are to accomplish the objectives of ensuring U.S. workers' jobs are protected and their wage levels are not eroded by foreign labor.

In your response to the draft report, you indicated (1) DOL and the Administration have outlined legislative reforms to address serious deficiencies in both programs and (2) if Congress fails to enact immigration reform to change the current system, ETA intends to make as many administrative and regulatory improvements as can be implemented under current law to strengthen the programs.

The report's recommendations will remain unresolved and open until action has been taken to correct the identified deficiencies.

We would appreciate your response to this report within 60 days. If you have any questions concerning this report, please contact John Riggs in our Dallas office at (214) 767-6981.

Attachment

U.S. Department of Labor  
Office of Inspector General  
Office of Audit

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Final Report

The Department of Labor's  
Foreign Labor Certification Programs:  
The System Is Broken and  
Needs To Be Fixed

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Report Number: 06-96-002-03-321  
Date Issued: MAY 22 1996

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## ABBREVIATIONS

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AOS	adjustment of status
CO	Certifying Officer
DOL	Department of Labor
DOS	Department of State
ETA	Employment and Training Administration
EWI	entered without inspection
FLC	foreign labor certification
GAO	General Accounting Office
INS	Immigration and Naturalization Service
LCA	Labor Condition Application program
PLC	permanent labor certification program
SESA	State Employment Security Agency
U.S.	United States

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## EXECUTIVE SUMMARY

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The Department of Labor (DOL) has responsibility for certifying employers' applications for certain employment-based permanent and temporary labor programs before aliens can obtain visas to legally work in the United States (U.S.). These responsibilities are carried out primarily by DOL's Employment and Training Administration (ETA), assisted by the ETA-funded State Employment Security Agencies (SESA).

We performed an audit of DOL's employment-based permanent labor certification (PLC) program and the temporary H-1B Labor Condition Application (LCA) program for the period October 1, 1992 through September 30, 1993.

In our opinion, while DOL-ETA is doing all it can within its authority, the PLC and LCA programs do not protect U.S. workers' jobs or wages because neither program meets its legislative intent. DOL's role amounts to little more than a paper shuffle for the PLC program and a "rubber stamping" for LCA program applications. As a result, annual expenditures of approximately \$50 million for DOL's foreign labor programs do little to "add value" to the process.

If such programs continue, DOL should be removed from the process unless a more meaningful role is defined. We believe changes must be made to ensure U.S. workers' jobs and wage levels are protected.

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## AUDIT RESULTS

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The PLC program is employment-based and is intended to exclude aliens who seek admission to the U.S. or status as an immigrant for employment purposes when qualified, willing U.S. workers are available for jobs. The program does not currently protect U.S. workers' jobs; instead, it allows aliens to immigrate based on their attachment to a specific job and then shop their services in competition with equally or more qualified U.S. workers without regard to prevailing wage.

The LCA program is intended to provide U.S. businesses with timely access to the "best and the brightest" in the international labor market to meet urgent but generally temporary business needs while protecting U.S. workers' wage levels. We found the program does not always meet urgent, short-term demand for highly skilled, unique individuals who are not available in the domestic work force. Instead, it serves as a probationary try-out employment program for illegal aliens, foreign students, and foreign visitors to determine if they will be sponsored for permanent status.

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## The Permanent Labor Certification Program

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For the 24,150 aliens for whom alien labor certification applications were certified under the PLC program, we determined:

- 99 percent were in the U.S. when the application was filed.
- 74 percent were working for the U.S. employer at the time of application.
  - ▶ 16 percent of these were out of status.
    - 8 percent had pleasure visas.
    - 1 percent had business visas.
    - 4 percent were in the U.S. illegally.
    - 3 percent had other visas.
- 11 percent never worked for the petitioning employer after adjustment to permanent resident status even though the only reason for obtaining the green card was that no qualified, willing U.S. workers were available.
- 17 percent left the employer within 6 months after adjustment to permanent resident status.

The PLC labor market test is perfunctory at best and a sham at worst. The PLC program requires a test of the labor market to ensure there are no qualified, willing, and available U.S. workers for employment in a job for which an application has been made. For the 12 states in our sample, we analyzed all SESA job orders related to alien certification applications, referrals, and placements for a 6-month period. Of the 28,682 applicants referred on 10,631 job orders during the period, **only 5 (0.02 percent) were hired.**

We also evaluated the results of the labor market test for the 600 cases included in our random sample of permanent labor applications certified during the audit period. Our results have been projected to the universe of 23,403 cases during the audit period that required a test of the labor market.

- 23 percent (5,392) had no resumes in response to advertising and no SESA referrals.
- 77 percent (18,011) resulted in 136,367 applicants and only 104 hires, a **0.08 percent hire rate.** These 104 hires were incidental to the aliens being hired; i.e., the specific jobs advertised were still filled by the aliens.

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## **The Labor Condition Application Program**

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Based on our employer contacts, we determined that 4 percent of the aliens in the LCA program were treated as independent contractors *by* their LCA employers, and 6 percent were contracted out, by their LCA employers, to other employers. Moreover, our contacts with LCA employers disclosed:

- 75 percent of the aliens worked for employers who did not adequately document that the wage specified on the LCA was the proper wage, and
- 19 percent of the aliens were paid below the wage specified on the LCA, when we could determine the actual wage paid.

Some LCA employers use alien labor to reduce payroll costs either by paying less than prevailing wage to their own alien employees or treating these aliens as independent contractors, thereby avoiding related payroll and administrative costs. Other LCA employers are “job shops” whose business is to provide H- 1B alien contract labor to other employers.

The only protection the LCA H-1B program supposedly provides U.S. workers is that the employer is required to pay the alien the prevailing wage for the specialty occupation. Yet, with the increasing use of H-1B workers and employers’ failure to either document and/or pay the prevailing wage, the prevailing wage may be eroded over time.

The LCA program has become a stepping stone to obtain permanent resident status not only for the “best and brightest” specialists but also for students, relatives, and friends.

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## **RECOMMENDATIONS**

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DOL’s PLC and LCA programs do little to protect the jobs or wage levels of U.S. workers. Accordingly, we recommend the Assistant Secretary for Employment and Training work with the Secretary and the Congress to:

1. eliminate DOL’s PLC and LCA programs as they currently exist;
2. establish a new program to fulfill Congress’ intent, at the same time correcting the deficiencies identified by our audit; and
3. if DOL has a role in the redesigned program, ensure DOL’s costs are fully recovered by charging user fees to the employers who benefit from the programs.

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## ETA Response

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ETA agreed that the foreign labor programs do not protect U.S. workers' jobs or wages from foreign labor because neither program meets its legislative intent. ETA stated that the draft report provided a substantive basis for legislative reforms which DOL and the Administration have recommended to provide better protection for U.S. workers.

ETA also indicated that if Congress fails to pass legal immigration reform to change the current system, ETA intends to make as many administrative and regulatory improvements as can be implemented under current law to strengthen the programs.

The full text of ETA's response is included as Appendix II to this report.

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The report's recommendations will remain unresolved and open until actions are completed to correct the identified deficiencies.

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## AUDIT RESULTS

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### **CHAPTER ONE: DOL's Permanent Labor Certification Program Does Not Meet Its Intent of Excluding Foreign Workers When Qualified, Willing U.S. Workers Are Available.**

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20 CFR 656.2(c)(1) provides that certain aliens who seek admission to the United States or status as an immigrant for the purpose of employment shall be excluded unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

*(i) There are not sufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and*

*(ii) The employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.*

It is the responsibility of DOL's Employment and Training Administration (ETA) and the ETA-funded State Employment Security Agencies (SESA) to oversee a test of the labor market for purposes of assuring there are no able, willing, and qualified U.S. workers available for employment in jobs for which an application for alien employment certification has been filed. Based on documentation submitted by the petitioning employer, through the SESA, ETA can either deny or approve the application and issue the labor certification.

In our opinion, the system is seriously flawed. The programs are being manipulated and abused. For the most part, employers use the program to obtain permanent resident visas for aliens who already work for them, some illegally. Others use the program to obtain the green card for friends or relatives for jobs that may or may not actually exist.

DOL's alien labor certification/attestation programs cost approximately \$50 million annually,<sup>1</sup> the preponderance of which is spent on the PLC program. Consequently, the PLC program process is a costly, time-consuming paper shuffle that does little, if anything, to protect jobs for U.S. workers.

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<sup>1</sup>These costs represent the annual average -- based on FYs 1993, 1994, and 1995 data -- of foreign labor certification (FLC) program grants to SESAs and wage and fringe benefits of Employment and Training Administration personnel assigned to the FLC program. Because exact ETA personnel costs were not readily available, we estimated ETA's salary and fringe benefit costs from the number of full-time equivalent positions assigned to the FLC program by grade level.

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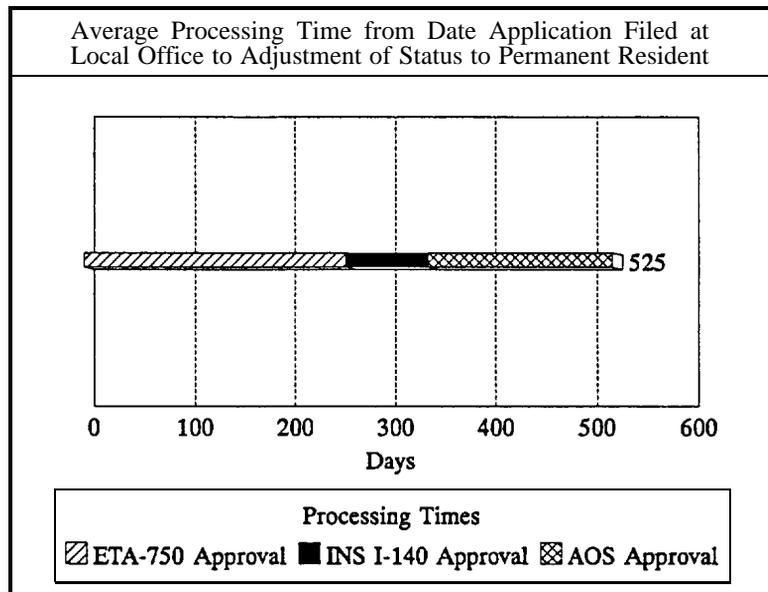
**1. The required labor market test is not designed to survey the labor pool available at” the time the alien actually adjusts to permanent resident status.**

---

The PLC program requires employers to test the labor market for the availability of able, willing, and qualified U.S. workers *at the time of application for a visa and admission to the United States* on the alien’s behalf. Yet, on average the alien will not become a permanent resident for approximately 1 ½ years after the employer files the alien labor certification application.

As Figure 1 shows, it takes on average 525 days from the time the employer first files an ETA-750, Application for Alien Employment Certification, with the SESA for DOL to approve the application and for INS to approve the petition (INS I-140) and adjust the alien to permanent resident status (AOS).

The labor market test conducted at the beginning of the application process does not identify the pool of qualified, willing U.S. workers who may be available at the time the alien adjusts to permanent resident status. Moreover, our audit disclosed that during this time most aliens are **not awaiting visas for admission to the U. S.**; rather, they were already working for the employers either under other visa statuses or illegally.



**Figure 1**

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**2. Despite a costly, time-consuming recruitment process, the required labor market test did not result in the hiring of U.S. workers over foreign labor.**

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The PLC program's required labor market test is ineffective in ensuring that qualified, willing, and available U.S. workers are given a fair opportunity to compete for the jobs for which aliens are hired.

The labor market test begins after the SESA has completed its review of the employer's application. The SESA prepares and processes a job order through the regular employment service recruitment system. During the 30 calendar days the job order is open, the employer is required to advertise the position for 3 consecutive days in newspapers of general circulation and in appropriate trade or ethnic publications or professional journals. The advertisement requires that applicants' resumes be sent to the SESA which forwards them to the employer.

The employer may obtain potential job applicants from two sources: SESA referrals and resumes forwarded by the SESA in response to the employer's advertising. At the completion of the recruiting period, the employer must provide a specific, lawful job-related reason why each applicant was not hired. While many U.S. workers apply for the jobs covered by the application, few get hired.

The required labor market test is a costly, ineffective process that provides little, if any, protection or opportunity for the U.S. worker. Furthermore, the process frustrates not only the U.S. workers who apply for the jobs but also the SESA employees who attempt to do their jobs of referring qualified U.S. workers to the employer.

We evaluated the results of the labor market test by analyzing 1) the advertising and SESA referral activity for the 600 cases in our random sample, and 2) the total SESA job order and referral activity for labor certification job orders for the period July 1, 1994 through December 31, 1994, for the 12 states in our immigrant program sample.

**a. The number of U.S. workers hired as a result of the labor market test was negligible.**

The results of our review of 600 sampled cases have been projected to the universe of 23,403 cases that required a labor market test<sup>2</sup> as follows:

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<sup>2</sup>The universe excludes 747 (3 percent) special handling cases -- teaching positions at colleges or universities or aliens of exceptional ability in the performing arts -- that do not require the labor market test. For teaching positions, the school must document the recruiting process and show that the alien is more qualified than any of the U.S. workers.

23 percent (5,392) had no resumes in response to advertising and no SESA referrals.

77 percent (18,011) resulted in 136,367 applicants and only 104 hires, a 0.08 percent hire rate. These 104 hires were incidental to the aliens being hired; i.e., the specific jobs advertised were still filled by the aliens.

Some of the reasons why 23 percent of the cases had no resumes in response to advertisements or no referrals from the SESA were:

SESA personnel are reluctant to waste their own and the applicants' time on referrals for job interviews when they know there is no real job opening.

Employers run newspaper advertisements on non-peak days (Monday, Tuesday, Wednesday) rather than on peak advertisement days (Friday, Saturday, Sunday) to limit the advertisement's exposure to U.S. workers.

Employers bury advertisements in the smallest available print, mislabel the jobs being advertised, and fill advertisements with baffling abbreviations making the job requirements unclear.

Newspaper advertisements do not identify the employer but instruct the applicants to send their resumes to the SESA. Applicants learn to identify these as foreign labor certification jobs for which they know they will not be hired.

Employers' advertisements sometimes understate the wage they are willing to pay so some qualified U.S. workers do not apply.

We also analyzed the SESAs' job order and referral activities for the 12 states in our PLC program sample. From July 1, 1994 through December 31, 1994, the 12 SESAs placed 10,631 job orders and made 28,682 applicant referrals which resulted in 5 placements, a 0.02 percent hire rate. This insignificant placement rate is why SESA personnel are reluctant to waste their time referring individuals to job interviews.

**b. Employers consider the labor market test to be perfunctory rather than real.**

Employers conduct the labor market test to comply with the law. That the labor market test is perfunctory is suggested in a handbook for immigration attorneys.

The Labor Certification Handbook<sup>3</sup> includes a sample letter attorneys can send to the employer when the attorney has been engaged to represent the employer in a labor

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<sup>3</sup>Immigration Law Library, Labor Certification Handbook, copyright 1992 Clark Boardman Callaghan, a division of Thomson Legal Publishing Inc.

certification application on behalf of an employee. Page 2-55 of the sample letter includes the following paragraph:

*The Department of Labor (DOL) requires you to approach the process as though you are willing to hire an American worker if one is qualified and available, although it will not force you to hire such a worker if one is located. This requirement is intended to assure that a fair test of the labor market is conducted. Therefore, the employer may not discourage U.S. workers who apply for the job, or tell them that the job is already filled by the foreign national or that recruitment has been undertaken strictly for labor certification purposes. Nor may the foreign national participate in interviewing or evaluating U.S. job applicants, because that participation gives the appearance that a fair test of the labor market is not contemplated.*  
[Emphasis added.]

In fact, aliens occupying the jobs sometimes interview U.S. workers for the jobs. For example:

**Case 1:** A petitioning employer decided to hire the alien as a general manager for his tailoring supply operation. The employer petitioned for the alien's labor certification in July 1992. In the meantime, the alien was hired illegally in January 1993. Eleven applicants applied for the job in response to the employer's advertising. All applications were reviewed, and all interviews were conducted by the alien, who was already illegally working in this position. Not surprisingly, all 11 applicants were found to be unqualified.

Page 2-58 of the previously cited Labor Certification Handbook's sample letter also contains the following attorney instructions to the employer:

*I will help you to evaluate the resumes to determine those applicants who are not qualified and those who could be qualified based on the information provided . . . Remember that you must conduct this process as though the job is open to any qualified U.S. worker.* [Emphasis added.]

Another case in our sample emphasizes this "determination process" is manipulated to not hire qualified applicants.

**Case 2:** The petitioning employer filed an application for a machine operator in a machine shop. Contrary to the October 28, 1993, petition to INS indicating the alien resided in Peru, he had been hired by the employer in January 1990 and was still working at the time of our interview in September 1995. The employer was unable to provide any documentation to show that the alien had any legal status to work in this country prior to obtaining his permanent residence status in May 1994, over 4 years after he was hired. After being employed (illegally) for some time, the alien asked the employer to help him obtain a permanent resident visa. The alien hired an attorney and paid all of the expenses in obtaining the visa. The attorney handled all the details including advertising the job and reviewing 101 applicants' resumes. At no time did the employer setup any interviews with the applicants. All applicants were determined not qualified for the job, most because they did not have experience operating a specific type of grinder. Only one of the employer's

seven machine operators, including the alien, had any experience with the particular brand of grinder when they were hired. Many of the 101 applicants had more grinding experience than the alien did when he was originally hired. The employer indicated he was not willing to train another machine operator since he had already trained the illegal alien. The alien's pay ranged from \$9.50 to \$11.50 per hour, significantly less than the advertised wage of \$14.50. The employer stated he thought the \$14.50 per hour rate on the application was what he would have to pay anyone he might have hired, but he did not realize that he had to pay this rate to the alien who already worked for him.

**c. Employers create nonexistent jobs to help aliens obtain permanent resident status.**

We determined employers advertised nonexistent jobs simply to obtain permanent resident visas for relatives, friends, and acquaintances. Three case examples demonstrate this.

**Case 3:** At the alien's request, the petitioning employer (a church) filed an application for alien labor certification for the position of deacon. According to the September 1, 1992, application, the alien was already working for another employer while under an F-1 student visa; yet, the alien only attended school for 2 months in 1988. According to a church official, the alien was a volunteer deacon, who requested the church sponsor him for permanent resident status. Nearly all church work is volunteer, as the church had only three employees. The alien's attorney processed all the paperwork and the alien paid all the fees. Upon adjusting to permanent resident status, the alien continued his paid employment with the employer he was working for at the date of application, and he continued as a volunteer deacon. In our opinion, the church never intended to employ him as a deacon.

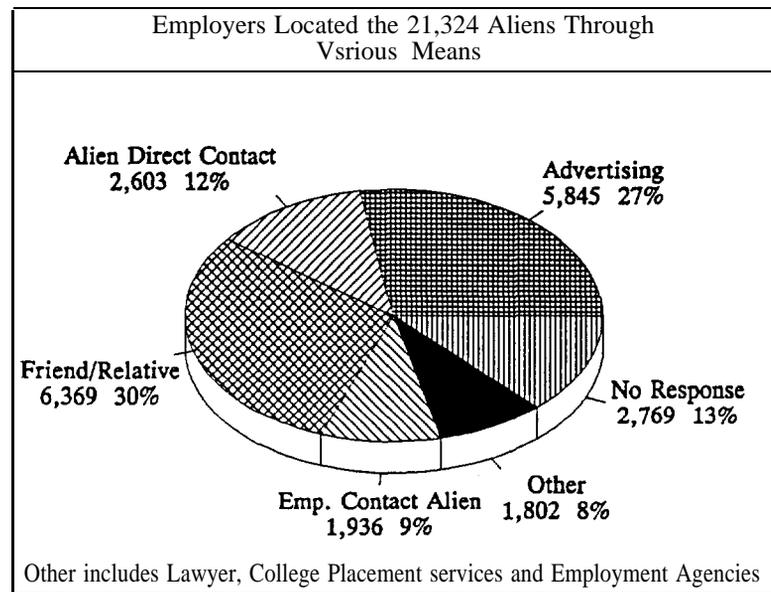
**Case 4:** The petitioner, a doctor with eight employees and a business partner, filed a foreign labor certification for an alien with the same last name as the petitioner's partner and who lived in a condominium owned by the petitioner's partner. The petitioner, rather than his business partner, signed and submitted the application, we assume to avoid the application/petition having the same last name for both the petitioner and alien. Six U.S. applicants applied for this job; all were rejected. The alien became a permanent U.S. resident approximately 16 months after submission of the labor certification paperwork. The alien never was employed by the petitioner because the job never existed.

**Case 5:** This petitioning employer was the alien's brother. The alien first started working for his brother in April 1992 as a project engineer while in the H-1 temporary nonimmigrant status. He was never on the official payroll but instead was paid as an independent contractor. The brother then submitted the ETA-750 that began the process of obtaining permanent resident status for his brother. Approximately 2 months subsequent to becoming a legal permanent resident of the U. S., the alien quit working for his brother and started his own business. The position the alien held was never refilled.

**d. Employers' contacts with the aliens occur long before the labor market test.**

We asked the petitioning employers how they located the aliens.

As Figure 2 shows, the predominant (39 percent) means by which employers located the aliens was by the alien contacting the employer either directly or in response to the employers' advertisements which occurred prior to filing the application. Therefore, the alien may have already competed with U.S. workers without the employer having to justify why U.S. workers were not qualified. Another 30 percent of the aliens were either friends or relatives of the petitioning employer.



**Figure 2**

The following case shows how an employer advertised a job to obtain permanent resident status for an entire family, including himself -- the owner -- who filed the petition.

Case 6: In this case the petitioning employer was a cosmetics store owner. We are uncertain what visa status the owner had. We know he was not a permanent resident alien. The owner sponsored an alien who worked in France for a cosmetics retail store from 1985 to 1990 before moving to Texas. She worked for the petitioning employer beginning in February 1991 in E-1, treaty trader status. In February 1993 the owner filed an application for the alien's permanent work authorization based on her knowledge of the particular line of French cosmetics his company handled. The alien adjusted to permanent resident status in November 1993 and continued working as the store manager, the position she has held since 1991. At the time the alien adjusted to permanent resident status, she also petitioned for permanent resident status for her two sons and husband who owned the store. The alien has been married to the owner since 1977.

**e. Employers specifically tailor advertised job requirements to aliens' qualifications.**

The jobs' education and experience requirements were based on the aliens' qualifications. not on& skills required to perform the work. The case below shows how employers tailor 'the job description and/or special requirements to the aliens' experience.

<b>Case 7</b>	
<b>Description of Job to be Performed</b>	<b>Alien's Job Experience</b>
Conduct research in parallel computing and processing to develop software tools, applications, and techniques to resolve software problems in parallel processing. Formulate parallel algorithms and devise new software techniques to enhance interprocessor communication in parallel computers and improve performance of application programs.	Conduct research in parallel computing and processing to develop software tools, applications, and techniques to resolve software problems in parallel processing. Formulate parallel algorithms and devise new software techniques to enhance interprocessor communication in parallel computers and improve performance of application programs.
<b>Special Requirements/Experience</b>	<b>Alien's Special Skills or Experience</b>
(1) Ph.D. Dissertation on parallel algorithms. (2) Concentration (18 semester hours of graduate courses & research) in parallel computing. <b>(3) Evidence (minimum 2 articles) of parallel computing research published in professional journals.</b>	Collaborate with other members of parallel computing group in determining direction for new research in this field. <b>Publish findings in technical journals.</b>

The job description and alien's experience are an exact match. The alien was already working for the employer at the time the application was filed. The special requirements identified on the application appear to be customized to fit the alien's qualifications rather than represent actual job requirements. This appears to be a restrictive criteria to eliminate qualified U.S. workers.

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**Conclusion regarding labor market test**

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The labor market test is a time-consuming paper shuffle that employers endure to give the appearance of complying with the law. Regardless of the qualifications of U.S. workers who apply for the job, the employers do not seriously consider them because the employer has already hired, or has full intentions of hiring, the alien. The labor market test is an expensive game employers play to get the certification.

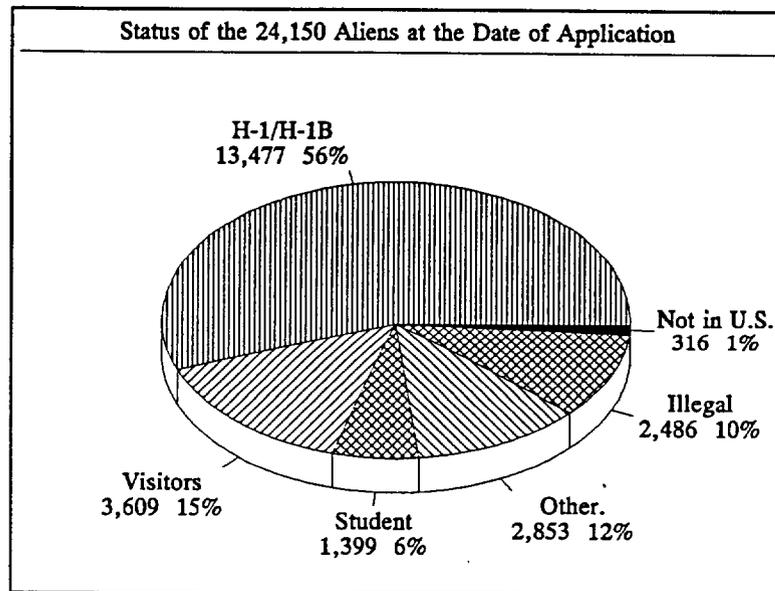
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**3. Virtually all aliens who eventually obtained permanent resident status were in the U.S. at the time of application; three-quarters were already working for the petitioning employer.**

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We found that 23,834 (99 percent) of the 24,150 aliens who obtained permanent resident status were already in the U.S. when the employer filed the application.

Figure 3 shows that at the time the application was filed, the majority (77 percent) of the employment-based immigrants were in the U.S. under the temporary H-1/H-1B, visitor (B-1, business; and B-2, pleasure), and student F visas. Another 10 percent were in the U.S. illegally.



**Figure 3**

Furthermore, at the time the 24,150 applications were filed:

74 percent were already working for the employer that filed the application, the majority in H-1/H-1B temporary status.. (See Figure 4 on next page.)

21 percent were not working for the employer.

14 percent subsequently worked for the employer.

7 percent never worked for the employer.

5 percent were of unknown status because either we could not locate the employers or the employers were uncertain as to when the aliens started working for them.

As Figure 4 shows, of those 17,901 aliens working for the employer at the date of application, 84 percent had some type of visa that authorized them to work for the employer. Conversely, 16 percent were working without legal status, including 4 percent who were in the U.S. illegally and 9 percent who were here as visitors, predominantly for pleasure.

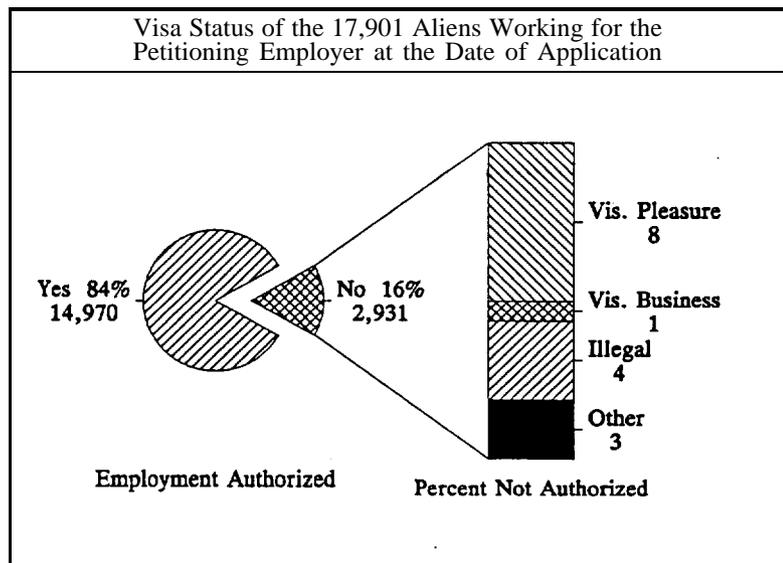


Figure 4

Figure 5 shows that of the 14,970 aliens legally working for the employer on the date the application was filed, 85 percent had H-1/H-1B (specialty occupations) temporary status, and 6 percent had student F-1 visas. The aliens with student visas went directly from student to permanent resident.

Some aliens obtain F-1 student visas, obtain H-1B nonimmigrant status, gain experience with the employer -- much of the time with the employer they worked with as a student -- and then begin the process of obtaining permanent resident status.

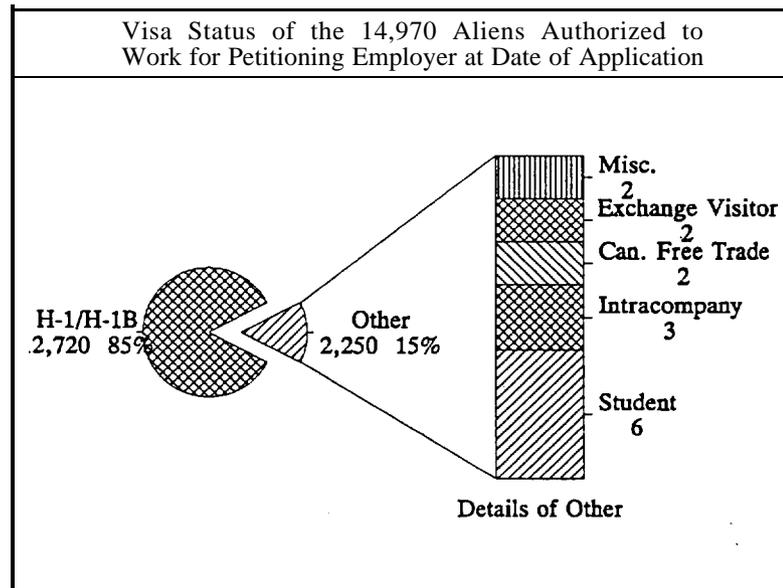


Figure 5

From files available we could not analyze the prior visa status, if any, of the 12,720 aliens who had H-1/H-1B visas at the time the employer applied for permanent labor certification. However, we were able to analyze the prior visa status of our H-1B nonimmigrant sample that is discussed in Chapter 2 of this report. Of the 51,536 H-1B nonimmigrants who were in the U.S. at date of application, 32 percent were in the F-1/F-2 student visa status when the employer applied for the H-1B visa on their behalf.

The Secretary of Labor described the sequence of events in the labor certification process in his September 28, 1995, Statement before the Subcommittee on Immigration of the Senate Judiciary Committee:

. . . most petitions for permanent employment-based immigrants are filed by employers on behalf of temporary foreign workers during or after a period in nonimmigrant status -- which often follows completion of their education at U.S. colleges and universities.

\* \* \* \* \*

. . . our employment-based immigrant selection system mostly deals with decisions about which foreign students and workers will be allowed to remain to live and work permanently in the U. S., not who will be allowed to enter to work in the U.S.

With 99 percent of the employment-based immigrants already in the U. S. at the time of application, 74 percent already working for the petitioning employer (76 percent while in temporary H-1/H-1B or student F status), and 32 percent of the H-1B aliens in student status at application date, the Secretary is correct; i.e., the PLC system is being used to determine which students or temporary workers will be allowed to remain in, rather than enter, the U.S.

**4. Over one-third of the PLC aliens either never worked for the sponsoring employer after adjusting to permanent resident status or left employment within 1 year of adjusting status.**

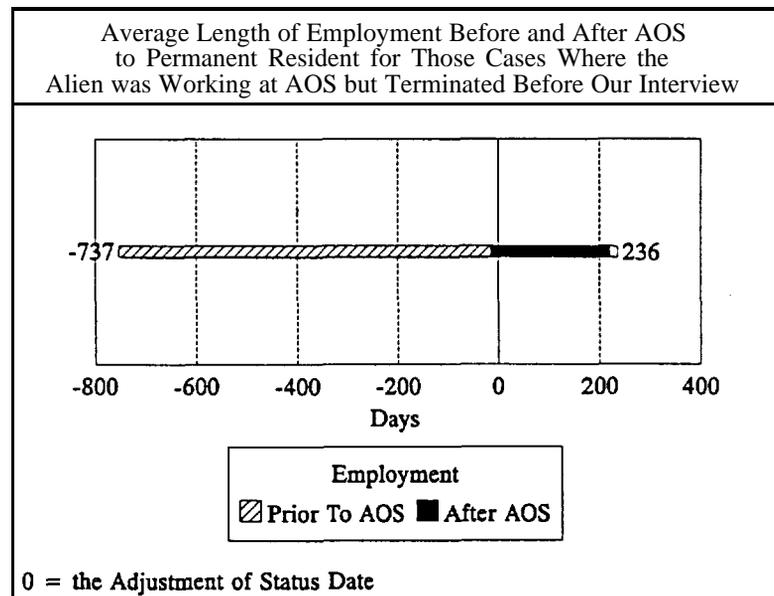
A significant number of the aliens never worked for the employer after the date of adjustment to permanent resident status, and many of those who worked after adjusting status left within a short period of time. Our findings indicate that the PLC program is being used to satisfy the needs of the aliens -- the attainment of the green card -- rather than to provide employers access to foreign labor where sufficient U.S. workers are not available.

We found that 11 percent of the PLC aliens never worked for the employer after adjusting status: 7 percent never worked for the employer at all, and 4 percent terminated employment before the adjustment of status date.

Of the 20,387 aliens who worked for the employer after adjusting status, 60 percent worked for the employer for over 2 years prior to adjustment to permanent resident status. Yet, many left the employer who sponsored them shortly after obtaining permanent status: 8 percent left within 90 days, 17 percent left within 180 days, and 33 percent left within 1 year.

Figure 6 shows the average length of employment both before and after adjustment of status to permanent status for the 8,350 aliens who terminated from the petitioning employer prior to our interview. This time line shows that the aliens are willing to work for the petitioning employer for whatever time it takes to obtain permanent resident status but terminate shortly thereafter.

We attempted to determine if there was a correlation between employer size and the length of employment with the petitioning employer after adjustment to permanent resident status.



**Figure 6**

We were able to determine employer size for 20,258 cases where the aliens were working for the employer at adjustment to permanent resident status.

- 8,642 worked for small employers (1 to 50 employees).
- 5,321 worked for medium-sized employers (51 to 1000 employees).
- 6,295 worked for large employers (over 1,000 employees).

The information on Figure 7 indicates that small employers lost their workers at a considerably faster rate than larger companies. We estimate that small companies lost 26 percent of their immigrants within 6 months of adjusting status. For medium and large companies, the number of immigrants not working for the petitioning employers 6 months after adjustment of status is less significant: 12 percent for medium-sized employers and 8 percent for large employers.

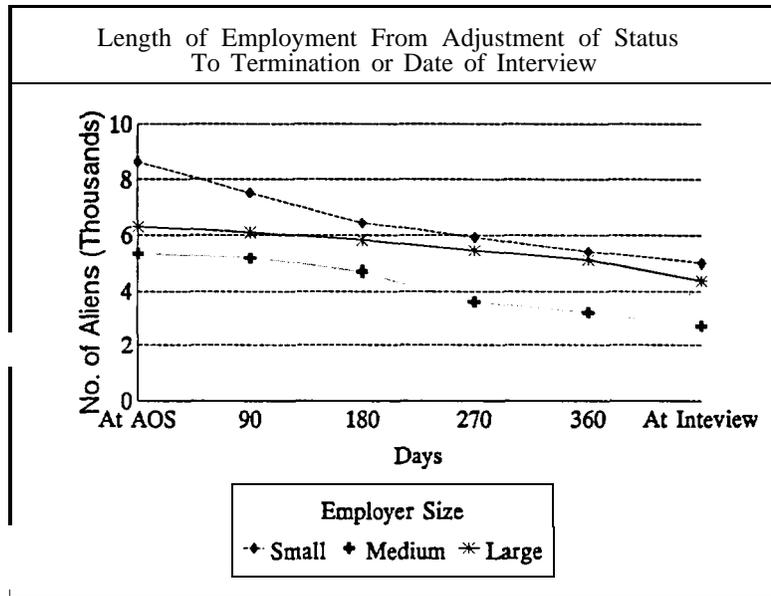


Figure 7

We also found that over 75 percent of the aliens who never worked for the petitioning employer and those who left the employer before adjustment to permanent resident status worked for small employers.

In our opinion, these facts indicate small employers are the ones most likely to use the system to help friends or relatives obtain green cards.

At the time of our interviews, 41 percent of the immigrants had left the employer. To attempt to determine if it was necessary for the jobs to have been filled by aliens or if the jobs were in fact real jobs, we asked the employers what happened to the job positions after the aliens left. Of the 8,350 jobs from which the immigrants terminated:

- 57 percent of those jobs were not refilled.
- 39 percent were refilled (75 percent of these by U.S. workers).
- 4 percent refill status is unknown.

The high percentage of jobs that were not refilled by employers or refilled with U.S. workers suggests that many of these jobs were available to aliens only to facilitate acquisition of the green card.

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**CHAPTER TWO: The Labor Condition Application Program is Being Manipulated Beyond Its Intent of Providing Employers the Best and Brightest in the International Labor Market While Protecting the Wage Levels of U.S. Workers.**

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The Labor Condition Application (LCA) program is intended to provide U.S. businesses with timely access to the “best and the brightest” in the international labor market to meet urgent but generally temporary business needs for specialty occupations while protecting the wage levels of U.S. workers. Jobs under the LCA program are filled by aliens with H-1B visas.

The protection the LCA program’ supposedly provides U.S. workers is that employers are required to pay the aliens the prevailing wage for the “specialty occupations. ” Unlike the PLC program, the LCA program does not require there be a shortage of U.S. workers in the occupation for which the aliens are being hired.

As stated in the General Accounting Office’s Report No. GAO/PEMD-92-17 (April 1992), Immigration and the Labor Market. Nonimmigrant Alien Workers in the United States:

*One of the major purposes of nonimmigrant work-related visas is to enable U.S. businesses to compete in a global economy. Increasingly, U.S. businesses find themselves competing for international talent and for the “best and brightest” around the world. (page 10)*  
[Emphasis added.]

8 U.S.C. §1101(a)(15)(H)(i)(b) defines a nonimmigrant for the H-1B program as:

*an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . or as a fashion model . . .*  
[Emphasis added.]

Specialty occupation is defined at 8 U. S.C. §1184(i)(1) as an occupation that requires:

*(A) theoretical and practical application of a body of highly specialized knowledge, and*  
*(B) attainment of a bachelor’s or higher degree in the specific specialty (or the equivalent) as a minimum for entry for the occupation in the United States.*

While some employers may have used the H-1B program as intended, others manipulated the program to fill entry level jobs and positions requiring a baccalaureate degree. Some of the H-1B aliens were paid as independent contractors, some were contracted out by the petitioning employer to other businesses, and others owned the businesses that petitioned on their behalf. Furthermore, the majority of employers did not adequately document how the required wage rate was established, and some employers paid less than the established wage. The LCA program is an attestation program, meaning employers are not required to provide any supporting documentation to substantiate information on the LCA submitted to DOL in

order to have it approved. 8 U.S.C. §1182(n)(1) defines the Secretary's responsibility and timeframe in the LCA process.

*. . . The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 1101(a)(15)(H)(i)(b) of this title within 7 days of the date of the filing of the application. [Emphasis added.]*

While DOL has the responsibility for basically 'rubber stamping' completed LCAs, 20 CFR 655.705(b) provides that in approving the alien's H-1B visa classification:

*. . . the INS determines whether the occupation named in the labor condition application is a specialty occupation . . . .*

Thus, DOL has no control over the approval process if the LCA is complete and free of obvious errors. Also, it does not appear that the full definition of "specialty occupation" is used when INS determines an alien's qualifications for an H-1B visa.

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**1. The LCA program is being stretched beyond its intent of providing employers with access to the best and brightest in specialty occupations to make the employers competitive in the global economy.**

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In our opinion, not all types of jobs being filled by H-1B aliens necessarily represent jobs that would enhance U.S. employers' abilities to compete in a global economy. While there is no requirement that there be a labor shortage in the occupation for which employers file LCAs, the H-1B program is being used to staff such positions as: accountants, piano instructors and accompanists, primary school teachers, physicians, and assistant professors and professors. While the aliens who filled these positions may have baccalaureate degrees, or equivalent, we question whether the jobs meet the full definition of specialty occupation.

The chart below shows the salary range for selected occupational groups.

Occupational Group	Percent of Applications	LCA Application Wag Range		
		Minimum	Maximum	Average
Accountant/Budget	10.9%	\$ 19,100	\$ 81,400	\$ 32,354
Biological Sciences	2.2%	15,000	80,000	36,468
Data Processing	21.9%	18,200	143,000	41,886
Education	11.2%	9,200	150,000	30,051
Engineering	13.5%	16,640	124,000	39,410
Health Related	11.0%	20,532	180,000	37,941
Managerial/Financial	6.6%	16,500	165,000	65,033
Other	22.7%	13,200	156,000	45,020
Overall		\$ 9,200	\$ 165,000	\$ 40,870

The salary range for occupations in the biological sciences, including research scientists, ranged from \$15,000 per year for an individual with a bachelor's degree to \$80,000 for an individual with a Ph.D. Although job requirements are different for the Ph.D. jobs, the Ph.D. salary range from \$19,500 to \$80,000 does not appear reasonable.

These salary levels raise the issue of whether the H-1B program is bringing in the best and brightest or simply individuals with baccalaureate degrees.

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**2. There is no certainty that U.S. workers' wages are protected by the LCA program's requirement that employers pay aliens the higher of the prevailing wage or actual wage paid to their employees who are similarly employed.**

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The wage rate the employer attested to on the LCA establishes the minimum wage the H-1B nonimmigrant must be paid. This wage rate is required to be the higher of the prevailing wage<sup>4</sup> or actual wage<sup>5</sup> being paid to others similarly employed. In the absence of those similarly employed, the employer is required to pay the prevailing wage.

The employer is required to maintain a public file to document (1) the method used to determine the wage to be paid to a nonimmigrant, and (2) the hiring of the nonimmigrant worker(s) will not affect the employment of other similarly employed workers. The employer's attestation to maintain this documentation and pay the prevailing wage is the only safeguard against the erosion of U.S. worker's wages.

In their review of LCAs, the DOL regional Certifying Officers (CO) do not verify or question if a public file actually exists. In fact, as previously cited, 8 U.S.C. §1182(n)(1) does not give the CO the authority to do so.

For 75 percent (40,924) of all cases where the nonimmigrant worked for the petitioning employer (54,867), the employer did not adequately document that the wage level specified on the LCA was the correct wage.

- 22 percent (11,762) for employers with no similarly employed employees.
- 53 percent (29,162) for employers with similarly employed employees.

Therefore, although the employers are attesting that they have adequately documented the wage to be paid the alien, most do not. For these cases we are unable to determine the full extent to which H-1B nonimmigrants are being paid less than the prevailing wage.

Nevertheless, many employers paid the aliens less than the LCA wage they certified they would pay, whether the wage rate was adequately documented or not. Of the 52,154 cases where the employers adequately documented the wage paid, 19 percent of the aliens were paid less than the wage specified on the LCA.

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<sup>4</sup>Prevailing wage is the wage rate paid to workers having substantially comparable jobs in the occupational category in the area of intended employment. (20 CFR 655.730(e) (1)(ii))

<sup>5</sup>In determining actual wage of those similarly employed, Congress intended that the employer consider: experience, qualifications, education, job responsibility and function, special knowledge, and other legitimate business functions. (20 CFR 655.730(e)(1)(i))

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### 3. Not all H-1B aliens were treated as employees of the petitioning employers.

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For those H-1B aliens who worked for the petitioning employer, 4 percent (2,116) were not in an employer-employee relationship with the petitioning employer.

#### a. Some aliens were paid as independent contractors.

Some employers paid the aliens as independent contractors, not employees. This is not allowable under the LCA program.

8 U.S.C. §1182(n)(1) provides that no alien will be admitted or provided H-1B status unless the employer has filed an LCA with the Secretary of Labor stating the following:

- (A) *The employer --*
- (i) *is offering and will offer during the period of authorized employment to [H-1B] aliens . . . wages . . . , and*
  - (ii) *will provide working conditions for [the H-1B alien] that will not adversely affect the working conditions of workers similarly employed.*
- [Emphasis added.]

20 CFR 655.715 defines **employer**:

*Employer means:*

- (1) *A person, firm, corporation, contractor, or other association or organization in the United States which suffers or permits a person to work within the United States;*
- (2) *Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee . . . .* [Emphasis added.]

These provisions indicate that to petition for H-1B status, the employer intends for the alien to be a temporary employee, not an independent contractor.

Internal Revenue Service Publication 15-A, Employer's Supplemental Tax Guide (January 1996), page 5, states:

*An employer must generally withhold income taxes, withhold and pay social security and Medicare taxes, and pay unemployment taxes on wages paid to an employee. An employer does not generally have to withhold or pay taxes on payments to independent contractors.* [Emphasis added.]

Some employers paid the aliens as if they were independent contractors. The employer paid the alien a set fee without withholdings for income taxes, social security, Medicare, etc. Furthermore, the employers were not reporting the wages to the SESA for state unemployment taxes. Since the employers were neither withholding social security or

Medicare nor paying state unemployment taxes, we assume the employers also did not pay either the employers' share of social security or the Federal unemployment tax.

Payments to these aliens were reported to IRS on Form 1099-MISC, the form businesses use to report payments to contractors, *rather than* a W-2 which is an employee earnings and withholdings statement. We do not know what supervisory responsibility or control the petitioning employer had over the work of these aliens, but they were paid as if they were independent contractors, not employees.

**b. Postdoctoral candidates did research under educational institutions' research grants.**

Some aliens received their H-1B visa as the result of petitioning colleges/universities. However, these aliens were not necessarily employees of the schools. They were postdoctoral scholars/fellows/associates doing research under grants. Again, since these aliens were compensated under grants, we are uncertain what control the schools had over the hiring, firing, supervision, or work. Such arrangements do not appear to be an employer-employee relationship.

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**4. Some aliens are themselves the petitioning employer, thereby filing petitions on their own behalf.**

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We found that 0.3 percent of the H-1B aliens were owners of the businesses that petitioned on their behalf. The aliens had to have someone else -- employee, friend, etc. -- sign the application/petition to hide the fact that they were sponsoring themselves.

A case example shows how the system was abused.

**Case 8:** The alien stated that while working in the U.S. under an E-1 (treaty trader) visa, she was hired by a partnership (the petitioning employer). She indicated she subsequently bought out the other partners in late 1990. When asked the names of the other partners, she could only remember their first names. We found no evidence these partners ever existed. Furthermore, Florida's incorporation records show the alien incorporated the business as sole owner on November 7, 1989, before she applied for her first of three H-1/H-1B visas in November 1989, and a year prior to the time she stated she purchased the business.

The petition indicated the employer was established in 1989 and had 20-40 employees/affiliates. The petition was signed by a vice-president of the business, whom the alien says she does not know. The company filed another application/petition for H-1B status on the alien's behalf in December 1992. According to the alien, both the LCA and petition were signed by the treasurer of the business. However, we found no evidence that a treasurer ever existed. The employer filed another application (September 1994) and petition (November 1994) for the alien. This time the application was supposedly signed by a secretary of the business, and the petition was signed by a "senior secretary." We found no evidence that these individuals ever worked for the business.

The petitioning employer's Florida address on the second and third petitions was the address of another business. The owner of the business at that address indicated that the alien was not employed at the address and denied any knowledge of the alien or the petitioning employer. We later determined that the wife of the employer at the address was a friend of the alien. The alien used the address as a mail drop while she was temporarily in Canada. Since 1993, the alien's business has been run from the alien's home in Georgia, but the corporation is still registered in Florida.

The petitioning employer is not registered with either the Florida or Georgia unemployment insurance agencies. Therefore, either the alien had no other employees who could have signed the LCAs/petitions or she was in noncompliance with state unemployment insurance laws.

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**5. Some employers hired H-1B aliens and then contracted them out to other employers.**

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We found that 6 percent of the 54,867 H-1B aliens who worked for the employer were contracted out by the petitioning employer to other employers. Some of the petitioning employers operate job shops -- companies which hire predominantly, or exclusively, H-1B aliens then contract out these aliens to other employers. The current H-1B law does not prohibit this practice; however, there is a concern that these job shops are paying the H-1B aliens less than prevailing wage, making contracting out with job shops more appealing to the U.S. employer. While we did not specifically audit for job shop contractors, in our opinion, the H-1B program was not intended for an employer to establish a business of H-1B aliens to contract out to U.S. employers.

One job shop contractor, identified in our sample, cycles foreign workers through the U.S. for technology-related jobs. We were unable to tell specifically what functions these H-1B aliens actually performed -- entry-level programming, systems analysis, systems development, software engineering, etc. -- because we did not have access to the aliens or to this job shop contractor's clients. However, for this job shop contractor, we obtained and reviewed one employee's "letter of deputation to the USA."

This letter of deputation states:

*You are being deputed to a project . . .*

*It is, therefore, essential that every member of the project team diligently performs the assigned role making sure that no disruption of work takes place. To ensure such consistent performance conforming to the stipulated conditions of quality and as a part of [employer's name] training efforts and **transfer of skills** . . . you as a project team member, will be required to sign a Service Agreement with the Company. This Agreement will also lead to the **transfer of skills and expertise gained by you on the project** to other personnel and projects of the Company. It binds you to complete your personal responsibilities and serve the Division on your return to [Country] for double the period of deputation, subject to a maximum of twenty four (24) months in [Country], and **impart the skills gained by you while abroad to your fellow workers.***

*If you fail to serve [Company] for the stipulated period on your return to [Country] . . . the **technical knowledge and skills gained by you OR could have been gained by you will not be transferred to other employees and projects undertaken by [Company].** It would be difficult or impossible to determine the cost, damage or injury which the Company would suffer. [Emphasis added.]*

With the emphasis on the skills to be gained by the alien while in the U. S., these provisions seem to indicate that the individuals this job shop contractor was cycling through the U.S. may not be the best and brightest in the industry.

While this job shop contractor purports to be paying prevailing wage, aliens working for this job shop contractor may be paid this wage for work in excess of a normal 40-hour work week. The deputation letter states:

*As and when required, it will be necessary for you to work for a reasonable number of hours beyond the 40 hour working week.*

This requirement is also implied rather strongly in the Service Agreement section of the deputation letter:

*You are being deputed to a project which requires to be completed within a stipulated period in accordance with the quality standards agreed by [Company] with the client. Failure to meet these stipulations of time and quality standards would have serious repercussions on the credibility of the Company in the market, apart from entailing heavy penalties and loss of business with the client.*

*It is, therefore, essential that every member of the project team diligently performs the assigned role making sure that no disruption of work takes place.*  
[Emphasis added.]

The contract called for some of the wage to be paid in a foreign currency in the alien's home country. Furthermore, the contract states:

*You will be paid for your stay during the period of your assignment, a sum of U.S. [salary amount]/- per month. This is inclusive of all expenses including living, housing, transport, medical, utilities and incidental expenses related to your stay in the USA. . . .*

\* \* \* \* \*

*In places where there is no convenient public transport facilities is [sic] available, [the Company] will grant you a suitable loan for purchase of a used car. This loan will be recovered through monthly installments from your allowance. You will be fully responsible for maintaining, insurance and running of the car.*

Therefore, while these aliens are in this country temporarily for the benefit of the company -- generating contract fees -- they are expected to pay all their living expenses out of their salaries.

Our sample of LCA cases also included six petitions for another job shop contractor closely related to the one discussed above. For five of the six cases, the employer established the same prevailing wage -- \$27,000 -- for all jobs even though the jobs were located in four

different States. It is highly unlikely that the prevailing wage was the same for this job in all four locations. Also, the payroll system to document actual wages paid was inadequate to substantiate the aliens were paid the established LCA wage.

The employer deputed aliens for three of the five approved petitions where the prevailing wage was the same. For these three aliens the payroll records indicated the pay was for 160 hours per month, with a wage rate of \$2,250 per month (\$27,000 annualized). Not all months have 160 work hours. Furthermore, none of the three aliens were paid the established monthly wage.

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## RECOMMENDATIONS

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DOL's PLC and LCA programs do very little to protect the jobs or wage levels of U.S. workers. Accordingly, we recommend the Assistant Secretary for Employment and Training work with the Secretary and the Congress to:

1. eliminate DOL's PLC and LCA programs as they currently exist;
2. establish a new program to fulfill Congress' intent, at the same time correcting the deficiencies identified in our audit; and
3. if DOL has a role in the redesigned program, ensure DOL's costs are fully recovered by charging user fees to the employers who benefit from the programs.

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### ETA Response

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ETA agreed that the foreign labor programs do not protect U.S. workers' jobs or wages from foreign labor because neither program meets its legislative intent. ETA stated that the draft report provided a substantive basis for legislative reforms which DOL and the Administration have recommended to provide better protection for U.S. workers.

ETA also indicated that if Congress fails to pass legal immigration reform to change the current system, ETA intends to make as many administrative and regulatory improvements as can be implemented under current law to strengthen the programs.

The full text of ETA's response is included as Appendix 11 to this report.

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The report's recommendations will remain unresolved and open until actions are completed to correct the identified deficiencies.

# **APPENDIX I**

BACKGROUND  
AUDIT OBJECTIVES  
SCOPE AND METHODOLOGY  
SAMPLING PLAN

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## BACKGROUND

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The Secretary of Labor has responsibility for certifying employer applications for jobs for certain employment-based immigrant and temporary labor programs before the aliens can obtain visas to legally work in the U.S. Although DOL's approval of these applications alone does not allow an alien to work in the U. S., the employer cannot petition INS for approval of the requested alien visa without the DOL-approved application. Applications for permanent labor certification are accompanied by certain documentation demonstrating the employer's required test of the labor market for qualified, willing, and available U.S. workers, whereas, applications for the temporary H-B program are limited to certain employer attestations.

Both the permanent immigrant certification and temporary labor certification programs have annual limits as to the number of aliens that are allowed to work in the U.S. For the permanent program, there are also limits by country of the aliens' origin. The annual minimum preference allocation for permanent immigrants is 421,000 as follows:

Preference group 1: family-sponsored	226,000
Preference group 2: employment-based	140,000
● priority workers (40,040)	
● professionals with advanced degrees and aliens of exceptional ability (40,040) <sup>6</sup>	
● skilled workers, professionals, and other workers (40,040) <sup>7</sup>	
● special immigrants (9,940)	
● employment creation (9,940)	
Preference group 3: diversity	55,000

Of the 140,000 preference allocation for employment-based immigrants, DOL plays a role in only 80,080 of this allocation (preferences highlighted above).

In this audit we reviewed only one temporary program (LCA) with an annual allocation of 65,000 aliens. However, in any year the allowable allocation is not reached, the unused allocation can be used the next year.

During FYs 1993, 1994, and 1995 DOL appropriations averaged over \$50 million annually in funding for the foreign labor certification program, including approximately \$45 million in

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<sup>6</sup>Any unused visas from preference 1 can also be issued under preference 2.

<sup>7</sup>Any unused visas from preferences 1 and 2 may be issued as preference 3 visas. However, visas issued for "other workers" are limited to 10,000 annually.

grants to the State Employment Security Agencies (SESA). The remaining funds were used to staff foreign labor certification positions in the ETA national and regional offices. Although a significantly higher number of alien workers enter the U.S. as nonimmigrants -- ETA approved 24,403 permanent applications and 62,188 H-1B temporary applications in FY 1993.

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## **The Permanent Program**

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The permanent labor certification program was established to help employers who were unable to find U.S. workers who were qualified, willing, and available to fill jobs. The program is an immigrant program because the alien is seeking permanent resident status, and the jobs are theoretically permanent.

DOL's permanent labor certification process involves activities at four, and sometimes five, separate levels. The following discussion summarizes the process:

### 1) The employer

Before an employer can legally hire an alien into a permanent job position, the employer must test the labor market for qualified U.S. workers. This labor market test includes both advertising the job in newspapers or professional journals and interviewing job applicants referred by the SESA -- either from applicant resumes/applications submitted in response to the employers' advertising or through SESA referrals from its own applicant files.

In order to obtain the labor certification, the employer must show that no available, interested U.S. workers met the job qualifications. The employer must provide a specific reason, in accordance with the law and regulations, for not hiring a U.S. worker that applied for the position. There are exceptions to this labor market test when dealing with universities and colleges. In addition, a waiver of the recruiting requirements can be issued if the employer can demonstrate that he/she has actively recruited workers and been unable to locate any acceptable U.S. workers who were qualified, available, and willing to perform the work.

The employer submits all labor market test documentation to the SESA for review.

### 2) The SESA

The DOL United States Employment Service (USES), a division of the DOL ETA, is responsible for the alien labor certification program. As part of the labor certification process, DOL USES contracts with individual SESAs to perform certain processing and recruiting activities for employers.

The SESA:

- reviews application to ensure occupational title and primary job duties are consistent;

- establishes and provides the employer with the prevailing wage for the job opening;
- reviews job advertisements for newspaper and/or professional trade magazines;
- receives job applicants' responses to job advertisements and forwards to employer;
- issues job order for advertised job and refers potential qualified applicants to the employer;
- performs final review of all required employer documentation before submitting employer's application and documentation to the DOL regional certifying officer (CO); and
- establishes the application priority date. (See INS procedures, item 4 below for discussion of priority date.)

After the employer has completed the application (ETA 750) and complied with the labor market test requirements, the SESA submits the application and documentation to the regional CO. The SESA may make recommendations to the CO regarding granting or denying the certification.

### 3) The DOL ETA

The regional CO, based on documentation submitted by the employer (through the SESA), must determine whether any qualified and willing U.S. workers are available for the job. ETA reviews each employer's application for artificial barriers or unnecessary and unreasonable job requirements. They also look for job requirements tailored to the alien's work experience. On the other hand, the DOL also has a responsibility to assist an employer when U.S. workers are not qualified, available, or willing to perform the work. The ETA regional offices can either:

- remand the application to the SESA for further processing or corrections;
- issue a Notice of Findings to the employer detailing problems that must be corrected before a decision can be made on the application;
- issue a denial after considering employer rebuttals to Notice of Findings and a notice of the right to appeal; or
- approve and issue the labor certification.

If the CO denies the application, the employer has the right to appeal the decision to the Office of Administrative Law Judges within a specified period of time.

If the CO approves the application, a written certification and the certified application are returned to the employer. The CO's certification only gives the employer the right to file

**a petition with INS, not the right to hire an alien worker.** Immigration and Naturalization Service (INS) and in some cases the Department of State (DOS), make the final decision on the alien's status.

#### 4) The INS

After receiving the certified application from the CO, the employer must file an I-140 petition with INS. INS decides whether the alien qualifies for the visa status requested and whether the employer has the ability to pay the prevailing wage offered. Furthermore, INS determines whether the position offered qualifies for the employment-based preference sought. For example, if a petitioner wants to hire someone with an advanced degree to fill a job that does not require an advanced degree, INS would not approve an I-140 petition for classification as a professional with an advanced degree. Both the alien and the job position must qualify for the employment-based preference classification sought.

All applications approved by the regional CO have a **priority date** assigned. The alien's priority date is established when the employer initially files the application with the SESA. Once this date is established, it does not change unless the DOL denies the application or INS denies the petition. Both INS and DOS use the priority date to determine when visas will be awarded for a given country and for given employment-based visa preferences (priority workers; professionals with advanced degrees; skilled workers, professionals, and others; special immigrants; and employment creation).

There are a specific number of visas available annually for each country for employment-based immigration. Therefore, INS's processing of permanent petitions is based on the number of visas available for each country and preference category. The INS and DOS will continue to advance the priority date for a particular country and particular employment-based visa category and issue visas based on the priority date until the annual visa allocation for that country has been met.

#### 5) The DOS

The DOS makes the decision regarding an alien's right to enter the U.S. and issues the necessary documents allowing the immigrant to enter the U.S. once the alien's priority date is current. If the DOS issues the immigrant visa, INS does nothing more than issue the I-551 Alien Registration Card after the alien gets to the U.S.

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## Temporary Programs

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The **temporary** Labor Condition Application (LCA) program is comprised of several different programs. These programs are considered nonimmigrant programs because the worker is not seeking permanent resident status. This audit was limited to one of the temporary programs, **H-1B specialty occupations**, which accounted for 94 percent of the nonagricultural temporary applications approved by ETA in FY 1993.

Jobs under the H-1B program are for a specified period of time; therefore, they are not permanent. Yet, these temporary jobs can be for as much as 6 years.

DOL's role in the H-1B program is simply to process employers' LCAs, a one-page application that the employer completes and submits directly to the CO for review. The Secretary's responsibility and timeframe to process the LCAs is found at 8 U.S.C. §1182(n)(1):

*. . . The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 1101(a)(15)(H)(i)(B) of this title within 7 days of the date of the filing of the application.*

If the employer has not completed all blocks or has not signed the LCA, the application is rejected, and the CO provides the employer a detailed explanation including the steps to correct the problem. The employer may immediately submit a corrected application to the CO. A resubmitted or corrected LCA is treated as a new-application; i.e., the 7-day clock for processing is renewed, and the application goes to the back of the applications to be processed.

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## AUDIT OBJECTIVES

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### Objectives

The audit objectives are to determine whether the Department of Labor is effectively administering the employment-based permanent labor certification and H-1B temporary Labor Condition Application programs and to determine the impact the programs have on employers and U.S. workers.

### Subobjectives

- What are the impact and costs of the certification process on employers and U.S. workers?
  - ▶ Were U.S. workers really considered for the jobs during the recruiting phase of the application process?
  - ▶ Do the aliens' qualifications and the applications' job requirements match?
  - ▶ How many workers responded to the employers' advertising and employment services' job referral activity for the positions?
  - ▶ How were the aliens recruited and selected for the jobs?
- Are U.S. workers being protected by the Department's regulations and policies?
  - ▶ Are alien workers paid the prevailing wage rates identified on the applications and petitions?
- Do employers have the required documentation for the permanent and LCA applications?
  - ▶ Have employers maintained the prevailing wage/actual wage documentation?
  - ▶ Did employers comply with the documentation requirements on the impact on similarly employed workers?
- How long did the aliens work for the employers and under what circumstances?
  - ▶ Did the employer refill the job and with whom: U.S. worker or alien?

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## SCOPE AND METHODOLOGY

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Our audit was performed by *reviewing the* employers' applications to DOL and petitions to INS for a sample of both the employment-based permanent labor certification and H-1B, Labor Condition Application (LCA) programs.. The audit fieldwork was conducted at ETA Regional Offices (except Denver); INS Service Centers (Lincoln, Nebraska; Laguna Nigel, California; St. Albans, Vermont); SESAs for the 16 states in the audit; and employers' business locations throughout the 16 states.

We conducted on-site visits to employers' businesses throughout the states selected for review. At the employers' businesses we conducted interviews with the employers relating to the applications/petitions filed, reviewed the public file relating to LCAs, reviewed payroll and information related to the payment of prevailing wage, and reviewed other records as necessary under the circumstances.

### **Audit period**

Our sample of permanent applications and LCAs selected for audit were selected from applications that were approved by the regional COs during our audit period October 1, 1992 through September 30, 1993 (Fiscal Year 1993).

However, the procedures we performed relating to SESA job orders filed for permanent applications, SESA applicant referrals to the job openings, and SESA placements relating to those referrals were performed for the 6-month period July 1, 1994 through December 31, 1994. We selected this 6-month period because of the possibility that this information may not still be available on the SESA's computer system for our audit period.

This audit was conducted in accordance with generally accepted government auditing standards.

## SAMPLING PLAN

Our audit universe started with 24,403 permanent applications and 62,188 LCAs approved by ETA during FY 1993. Because of immateriality and travel constraints, applications for Alaska, Hawaii, and U.S. territories were eliminated from the universe. However, our revised universe still included 99.1 percent of all permanent applications and 98.5 percent of all LCAs. The universes and sample sizes shown below are based on applications approved for the 48 contiguous states and the District of Columbia.

Because of the difference between the permanent and LCA programs, separate samples were selected for each program based on a 95 percent two-sided confidence limit and precision of  $\pm 4$  percent. We first selected two separate random samples of 12 states each based on the FY 1993 approved permanent applications and LCAs. The second stage was a random sample of 50 permanent applications for each state in the first state sample and 60 LCAs for each state in the second state sample.

In order for the sampling unit to be selected, INS had to have approved a petition for the job for which the application was submitted. Further, for the permanent program, the alien must have already adjusted to permanent resident status.

	<u>Permanent</u>	<u>LCA</u>
Universe:	24,184	61,250
Sample Sizes:		
States	12	12
Cases (per state):	50	60
Total cases	600	720

The following table indicates which states were selected for the two samples:

<u>Permanent and LCAs</u>		<u>LCAs only</u>	<u>Permanent only</u>
Wisconsin	New Jersey	Missouri	Washington
Texas	New York	Minnesota	North Carolina
Massachusetts	California	Georgia	Indiana
Pennsylvania	Florida	Connecticut	Illinois

These sampling plans account for 72 percent of permanent applications and 68 percent of LCAs approved for the states in our universe.

## U.S. Department of Labor

MAY 15 1996

Assistant Secretary for  
Employment and Training  
Washington, D.C. 20210

MEMORANDUM FOR: CHARLES C. MASTEN  
Inspector General

FROM: TIMOTHY M. BARNICLE *TB*  
Assistant Secretary

SUBJECT: OIG Audit of ETA Foreign Labor Programs

Thank you for the recent draft report of the Office of Inspector General's (OIG) audit of the permanent labor certification (PLC) program and the H-1B labor condition application (LCA) program. The Employment and Training Administration (ETA) asked the OIG to conduct this audit based on ETA's concern that our statutory role did not allow us to effectively protect U.S. workers' jobs from foreign labor. Your OIG draft report documents and confirms a number of the problems ETA had identified and provides a further substantive basis for legislative reforms which the Department of Labor (DOL) and the Administration have recommended. As your report states, while DOL is doing all it can within its authority, the foreign labor programs do not protect U.S. workers' jobs or wages from foreign labor because neither program meets its legislative intent.

ETA has had long-standing concerns about the ability of the permanent labor certification program to protect U.S. workers. The major barrier to providing the protection envisioned in the law is the fact that in most cases the alien already occupies the position for which certification is being requested. This creates a formidable impediment to any bonafide recruitment process.

The current process, requiring referral of U.S. workers to such jobs, is dictated by the statute which requires the Secretary of Labor to make a determination of whether able, willing, and qualified workers are available for the job. In the mid 1970's, the Courts interpreted the term "willing" in a manner that precluded ETA from using labor market information to make such determinations. Consequently, DOL has been required to show that there is a specific U.S. worker who is qualified and able to accept the employer's job before an application can be denied. ETA's operating experience and your report show that U.S. workers have little or no chance of being hired for jobs in which aliens are already employed. Therefore, it hardly seems reasonable to put U.S. workers through the frustration of applying for jobs which are simply not available to them.

One point should be clarified. Your auditors focused on approved cases -- since approximately one-quarter of the applications State Employment Security Agencies (SESAs) receive are dropped by the employers before any recruitment, approved cases represent about 49% of the total number of applications filed. (Of the applications subsequently processed by regional offices, approximately 65% are approved indicating a return and denial rate of about 35%.) This overall approval rate indicates that the program preserves jobs for U.S. workers to some modest extent. Clearly, strengthening the program would greatly improve protection of U.S. jobs.

With respect to the H-1B LCA program, ETA is prevented by statute, as your report recognizes, from conducting a meaningful review of LCAs submitted by employers. Unless it is found that the application is incomplete or obviously inaccurate, the LCA must be certified within 7 days of the date it is filed. Only if a complaint is filed can DOL look at the employer's documentation and payment of wages.

Since ETA requested the audit, we have launched our own reengineering efforts through the National Performance Review initiative to address program weaknesses and to achieve a more rational allocation of resources. This effort has involved Federal and State staff working together to reengineer the labor certification program. The goals of the performance review are to make fundamental changes and refinements that will: (1) streamline the certification process; (2) save resources; (3) improve the accuracy and consistency of prevailing wages, which will better protect the wages of U.S. workers; and (4) better serve U.S. businesses.

In September 1995 Congressional hearings, Secretary Reich and other DOL officials outlined major reforms supported by the Administration to address serious deficiencies in both the H-1B temporary and permanent employment-based immigration programs. Examples of these reforms include:

- A "no-layoff" provision, requiring employers to assure that they have not laid-off/displaced any US worker within 6 months prior to, or 90 days after, applying for foreign workers nor within 90 days before or after petitioning for such workers.
- A "no strike, no lockout" provision requiring employers to attest that the job specified in the application is not involved in a strike or lockout in a labor dispute.
- Requiring employers to certify that they have made good faith efforts to recruit and retain US workers for the job in the application, providing DOL with the enforcement powers necessary to ensure that employers comply with all their obligations under the permanent program.
- Overall reduction of employment-based immigration from current 140,000 to 100,000.
- Reducing the authorized period of stay of H-1B workers from 6 years to 3 years.

For the past two years, DOL has been working closely with Congress on its current efforts to reform the Nation's immigration system. DOL strongly supports a number of statutory changes for consideration by Congress, that would provide better protections for U.S. workers.

#### H-1B Nonimmigrant Program

- (1) A provision that would prohibit employers from obtaining nonimmigrant workers, through their own employ or through "job contractors," if they have laid off or otherwise displaced qualified U.S. workers in the same occupation within specified time periods.

- (2) A requirement that employers take timely, significant, and effective steps to recruit and retain U.S. workers before they seek foreign workers.
- (3) A reduction in the permissible length of stay for nonimmigrant workers from 6 years to 3 years.
- (4) Requiring compensation offered and paid to include cash wages, benefits, and all other compensation paid by the employer to its similarly employed workers.
- (5) Payment of user fees to help cover the administrative costs of the program.

#### Permanent Program

- (1) A labor certification system which would require businesses to employ U.S. workers as a substantial majority of its workforce and its recent hires during the 2 years prior to application.
- (2) Recruitment provisions that require the employer to have engaged in bona fide recruitment in the occupation using industry standards and prevailing compensation before the alien was hired, rather than the referral of U.S. workers to jobs already held by aliens at the time an application is filed.
- (3) New enforcement powers for DOL with respect to the permanent program.
- (4) Prohibiting experience gained while working without authorization from being used to qualify for the employment-based preferences requiring labor certification.
- (5) Requiring compensation offered and paid to include cash wages, benefits, and all other compensation paid by the employer to its similarly-employed workers.
- (6) Payment of user fees to help cover the administrative costs of the program.

Legal immigration reform legislation would provide the opportunity to make the necessary statutory changes in the basis for labor certification determinations and the underlying structure of the current system. Currently, both the House of Representatives and the Senate have passed legislation addressing *illegal* immigration, which should continue to remain separate from the complex legal immigration issue; unfortunately, the current House legislation contains a measure which would create significantly more problems within the H-1B program. We would strongly urge that these measures be dropped, especially in light of the OIG Report. If Congress fails to pass legal immigration reform to change the current system, DOL/ETA intends to make as many administrative and regulatory improvements as can be implemented under current law to strengthen the programs.